Comment on Recent Cases

THE NEGOTIABILITY OF BONDS IN CALIFORNIA AND THE NEGOTIABLE INSTRUMENTS LAW.—In *The Crocker National Bank of San Francisco vs. Byrne & McDonnell*[1] an assistant cashier who had access to the vaults of the bank for limited purposes took certain California bonds of the bank and hypothecated them to stockbrokers as margin on a personal account with them. The Supreme Court, reversing the trial court, allowed the bank to recover against the brokers for conversion on the ground that bonds are non-negotiable and that the assistant cashier, having no title, could pass none.

The term negotiability in the proper sense of the word implies two things: an assignability free from equities which the obligor could have set up against the assignor, and free from infirmities in the title of intermediate holders. It is possible for an instrument to be negotiable in one of these senses and not in the other. The trial court interpreted the case of Kohn vs. Sacramento Electric Gas & Railway Company[2] as referring to negotiability in the first sense, and as not constituting a binding precedent when the rights of intermediate holders were concerned. It would seem, however, that whatever might be the proper analysis of the facts, the opinion in the Kohn case held bonds non-negotiable in both senses. The opinion of the trial judge is really an attempt to whittle away an unfortunate precedent by confining it to its exact facts, and an attempt to state the law as it should have been if California had not got started on the wrong road. The Supreme Court, however, takes the Kohn case as it was evidently intended, to establish the complete non-negotiability of California bonds containing provisions in addition to those allowed by the Civil Code. The principal case, therefore, rests on the doctrine of stare decisis and as it establishes no general principles the code interpretation is not of great importance. One of the justifications for the Kohn case, however, is somewhat surprizing. The court says:

> "It may be that some of the reasons which led to the exception of negotiable instruments from the general rule that a seller can give no better title than he has himself would apply with equal force to instruments payable to bearer, but not negotiable in form. But this is not sufficient excuse or reason for including such instruments within the exception. The exception has been established from time im-

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[1] May 27, 1918, 173 Pac. 752.
[2] (1914), 168 Cal. 1, 141 Pac. 626.

> memorial and it has hitherto been confined to negotiable instruments, money, and currency. It is to be presumed that this is generally understood, that the owners of such property guard the same with greater care for that reason, a care which the owners of other property need not exercise."

Here is a decision almost unique and contrary to almost every decision in England and the United States,[3] and probably contrary to the understanding of almost every banker and bond-broker in the state, yet the Supreme Court calmly presumes that the owners of property have acted on this unexpected decision. Such a presumption should be defined as an inference which the law requires from facts which are not so. It justifies the remark to an English chancellor that he should get out of his court room and find what people were thinking about. The justification for the Kohn decision must rest only on the doctrine that the law is so written in the Code. When the king and his counsellors did not differentiate their functions as judges and as legislators it was not surprizing that no particular force was ascribed to statutes over decisions and that a statute might be repealed by the courts. This is the doctrine of many civilized countries.[4] But it is not the Anglo-American law, where a statute must be followed although, as Professor Gray has said, "it is not as speedy or as simple a process to interpret a statute as to repeal it, but with time and patient skill it can often be done". The trial judge in the principal case was starting that process.

As our code has unfortunately not been drawn so as to be capable of much expansion by its terms, the courts have been forced to indulge in much interpretation. The need for an expansive code has been well stated by Professor Pomeroy:

> "If a code was so constructed that, while it formulated all the doctrines and rules of the common law and equity, with such alterations, amendments, and additions as were thought proper, it still retained in all its parts the distinguishing excellencies of those systems,—their elasticity, their power of expansion, of development, of continuous adaptation to the progressive condition of society; if such a code, in addition to the detail of doctrines and rules, also embodied all the leading principles of the common law and of equity, to be interpreted not according to the letter of their statutory expression, but as living and fruitful sources of doctrines and rules, to the same extent and in the same

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[3] 10 Cyc. 1172.

[4] Gray, Nature and Sources of Law, §§ 400-419. Salmond, Jurisprudence, 142.

> manner as before their being clothed with a statutory form; if such a code contained all of the existing doctrines and rules of jurisprudence, stated in a complete manner, in consistent phraseology, with sufficient amplifications, explanations, illustrations, and applications; then the courts might look no further than the text of the legislation; might regard the code as the origin, the creation of a new era of jurisprudence. It was this kind of code and this alone which Austin advocated in all his writings, as capable of producing the benefits resulting from codification. It is this type of code which Lord Westbury, Sir James Fitzjames Stephen, and other leading law reformers in England have contemplated in all their discussions. . . ."[5]

It is a sad commentary on our progress in jurisprudence that no improvement has been made since Professor Pomeroy wrote those words. The French have had, like most continental countries, a particularly difficult problem on account of the fact that the commercial law is a branch of private law distinct from the general civil law. The Commercial Code represents a great advance in many branches of the law such as association, negotiable instruments, insolvency, etc. The effort has been to give the advantages of the Commercial Code to those to whom the provisions of the Civil Code laws were applicable. In some instances this has been accomplished by what has been aptly termed "spurious interpretation" . . . . "to meet deficiencies or excesses in rules imperfectly conceived or enacted".[6] In other instances, notably commercial instruments, a legitimate method of interpretation has been followed with gratifying results. The principle that the Civil Code had expressed the rule on this subject in the absence of the agreement of the parties or that the parties may adopt any rule they please is not contrary to sound public policy. "But the decisions of courts and the opinion of text-writers, after some little hesitation, have finally recognized that article 1690 has not that (imperative) character and that the formalities which it prescribes can at the will of the parties be rejected if they give to the instruments the form 'to order' or the form 'to bearer'." "Mais la jurisprudence et la doctrine d'abord quelque peu hésitantes ont fini par reconnaître que l'article 1690 n'a pas ce caractère et que les formalités qu'il édicte peuvent, au gré des parties, être écartées si elles donnent au titre la forme à ordre ou la forme au porteur."[7]

This method of interpretation is expressly recognized by sec-

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[5] 4 West Coast Rep. 151.

[6] Roscoe Pound, Spurious Interpretation, 7 Columbia Law Review, 379, where the evil effects of this method are fully shown.

[7] Lyon-Caen, De l'influence du droit commercial sur le droit civil depuis 1804, in Le Code Civil, Livre du Centenaire, 210-11.

tion 3513 of the California Civil Code: "The owner may waive the advantage of a law intended solely for his benefit. But a law established for public reasons cannot be contravened by a private agreement". There are few provisions of the code which cannot be changed by the agreement of the parties. Even section 726 of the California Code of Civil Procedure which provides that there can be but one action for the recovery of a debt secured by mortgage can be waived if the dictum of Mr. Justice Henshaw in Martin v. Becker[8] is followed. Furthermore, where the code provides for a particular case and says nothing about other cases it has usually been interpreted as not excluding the application of the provision to other cases. Thus, owners of personal property may be affected by admissions of their predecessors in interest, although the code refers only to precedessors in interest in the case of real property. The servitudes enumerated in the Civil Code are not exclusive, nor are the presumptions nor the subjects on which the court may take judicial notice, enumerated in the Code of Civil Procedure. How far can these principles of code interpretation be applied to the case at bar? The court evidently holds that the express provisions of the code necessarily exclude the addition of any other negotiable instruments, as the court has previously held that the code provisions in relation to suretyship are all inclusive and cover the new case of corporate sureties.[9] There was of course no express stipulation in the bonds in question that they should be considered negotiable. It was sought to reach this result by the fact that such was the common understanding. The language, especially of former section 3093 of the California Civil Code, is particularly strong: "A negotiable instrument must not contain any other contract than such as is specified in this article". If the language of the code did not necessarily exclude negotiability of bonds containing provisions found in the principal case, it might be possible to say that it was a situation unprovided for, or if the parties expressly provided that the bonds should be negotiable the code ought to be interpreted in all such matters as subject to the contrary agreements of the parties.

Is, however, the general understanding of the community equivalent to an express agreement? In some respects perhaps it ought to be, but there is danger in such a theory of code interpretation. It would mean that the code expressly and unequivocally says one thing, the law based on custom says another. It is a question of degree, but interpretation may be stretched beyond the breaking point. The difficulty is that no settled principles of code interpretation have been laid down as a guide to new cases. We can therefore only speculate as to

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[8] (1915), 169 Cal. 301, 146 Pac. 665.
[9] 6 California Law Review 80.

how the negotiability of bonds will be decided under the Negotiable Instruments Law enacted in California in 1917. To relieve all doubt, the amendment of 1915 to section 3088 of the Civil Code should be re-enacted. It would be advisable to do this as a separate statute, not as an amendment to the code, for the uniformity of the Negotiable Instruments Law should be preserved. In the absence of such a statute the question is doubtful. The English bills of exchange law made no attempt to cover new forms of negotiable instruments. "The law relating to negotiable securities for money, other than bills, notes, and cheques, is as yet very imperfectly developed, and is, therefore, unsuited for presentation in a codified form".[10] In this respect the English law is far superior to our own. It leaves the court free to decide new cases on common law principles. It is quite possible, however, to distinguish the Negotiable Instruments Law from our previous code sections. (1) The Negotiable Instruments Law has generally been interpreted as not excluding the negotiability of bonds made payable to order.[11] (2) The language of the Negotiable Instruments Law is less mandatory and imperative. (3) The Negotiable Instruments Law contains a provision which may be considered to recognize growth and expansion, namely section 3266D; Application of Act. "The provisions of this title do not apply to negotiable instruments made and delivered prior to the taking effect thereof. In any case not provided for in this title the rules of law and equity, including the law merchant, shall govern."[12]

A. M. K.

As an example of the oral opinions of the late Judge Seawell, his opinion in the case commented upon is annexed. It is believed that it is, aside from its inherent interest, a good illustration of his judicial manner.

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[10] Chalmers, Bills of Exchange, 6th ed., 316.

[11] Some of the cases cited in 10 Cyc. 1172.

[12] Amasa M. Eaton, On Uniformity in Judicial Decisions of Cases Arising under the Negotiable Instruments Law, 12 Michigan Law Review 88, 101.